

Remarks/Arguments

The Examiner has objected to the drawing due to inclusion of unreferenced characters; rejected Claims 1-19 based on indefiniteness; rejected Claims 1-6 and 8-11 under obviousness considerations of Cruess in view of Bettencourt et al.; rejected Claims 7 and 12-19 under obviousness considerations of Cruess in view of Bettencourt et al. and Floyd et al.; and rejected Claim 14 under obviousness considerations of Floyd et al. in view of Bettencourt et al.

Claims 1-3, 5-19 remain in the application; Claims 3, 6, 7, 12, 13, 16, 17 remain in the application as originally filed; Claims 1, 2, 5, 8-11, 14, 15, 18, 19 have been amended; new dependent Claim 20 has been added and Claim 4 has been cancelled.

a. Drawing Objection

The Examiner has objected to the drawing as failing to comply with 37 CFR § 1.84(p)(5) because they include the following reference character(s) not mentioned in the description: **137** and **139**. The specification on page 7, paragraph 2 lines 9 and 11 have been amended to include the reference characters pursuant to 37 CFR § 1.121(b).

b. Indefiniteness – generally

The burden for providing a prima facie case of indefiniteness under 35 USC §112 paragraph 2 lies with the Examiner. In particular, “definiteness of claim language must be analyzed, not in a vacuum, but in light of: (A) The content of the particular application disclosure; (B) The teachings of the prior art; and (C) The claim interpretation that would be given by one possessing ordinary level of skill in the pertinent art at the time the invention was made.” All three criteria must be lacking before a § 112 paragraph 2 should even be considered (See MPEP 2173.02.) Many of the Examiner’s § 112 paragraph 2 rejections appear to be recommendations to clarify the claim language as the plain meaning of several of the purported questionable terms and/or phrases is clearly ascertainable from the accompanying specification as discussed infra.

c. Indefiniteness – “shelf stable processing stream”

The Examiner has rejected claims 1 – 19 as being indefinite under 35 USC §112 second paragraph. Claims 1, 8, and 14 recite “shelf stable processing stream,” which the

Examiner regards as indefinite. Applicant's representative respectfully traverses this rejection. An applicant may be his own lexicographer; as such, the phrase "*shelf stable processing stream*," is clearly defined in paragraph 2 page 4, lines 8-9 of the specification as an "*aseptic bagging and canning processing stream*." The term "*stream*" takes on its normal dictionary meaning equivalent to "*a steady flow or succession*." Therefore, the clear meaning of the phrase "*shelf stable processing stream*," is equivalent to an "*ongoing aseptic bagging and canning process*." This phraseology would not be indefinite or otherwise ambiguous to one of ordinary skill in the art.

d. Indefiniteness – "*fresh produce*"

The Examiner has rejected claims 1-4, 6, 8, 9, 11, 14-16, and 18 as being indefinite under 35 USC § 112 second paragraph. Claims 1-4, 6, 8, 9, 11, 14-16, and 18 recite the phrase "*fresh produce*." The Examiner regards the term "*fresh produce*" as indefinite based on the relative term "*fresh*." Applicant's representative respectfully traverses this rejection as the phrase "*fresh produce*," takes on its ordinary meaning within the agricultural and produce market field and is well known and understood by one of ordinary skill in the art. For example, Del Monte® specifically advertises fresh produce and fresh cut produce for sale. Information is available on Del Monte's website at <http://www.freshdelmonte.com/ourproducts/freshcutproduceandсалads.aspx>. A copy of the webpage is provided in the Appendix to this correspondence as evidence of what constitutes fresh produce.

Moreover, the USDA has considerable information on what constitutes "*fresh produce*." See for example, www.usda.gov. For the convenience of the Examiner, a copy of a relevant webpage is provided in the Appendix to this correspondence. Lastly, common grocery markets have entire sections devoted to what constitutes "*fresh produce*;" as such, the term "*fresh*" or the phrase "*fresh produce*" is not only known to one of ordinary skill in the art but is *commonly* known in the wholesale and retail markets dealing with agricultural products. The plain meaning of "*fresh produce*" is clearly self evident.

e. Indefiniteness - "*undesirable sections*"

The Examiner has rejected Claims 2, 6, 8, 11, 15, and 16 as being indefinite under 35 USC § 112 second paragraph. Claims 2, 6, 8, 11, 15, and 16 recite the phrase *"undesirable sections,"* which the Examiner regards as indefinite. Applicant's Representative respectfully traverses this rejection. The metes and bounds of what constitutes *"undesirable,"* is clearly discernable from the detailed description, page 6, paragraph 1 lines 13 – 15 as *"bruises, damages, infestations, decay, improper coloration, inadequate size, improper ripeness or other undesirable aesthetic qualities."*

In addition, the last paragraph of page 7, paragraph 4, lines 21 – 23, the specification clearly defines *"undesirable sections,"* as *"juices, stem tops, ends, bruised portions, damaged portions, decayed portions, insect infested portions, non-uniform colorations, etc."*

Lastly, the Examiner's cited prior art to Cruess, photographically depicts and textually describes what generally constitutes *"undesirable sections"* relevant to both shelf stable and fresh produce processing on pages 436-437. (The requirements for fresh produce processing being narrower than for shelf stable processing.)

f. Indefiniteness – *"visual characteristics I"*

The Examiner has rejected Claims 4, 8, and 18 as being indefinite under 35 USC § 112 second paragraph. Claims 4, 8, and 18 recite *"visual characteristics,"* which the Examiner regards as indefinite. The term *"juiciness,"* is provided as an example of indefiniteness. Applicant's Representative respectfully traverses this rejection. Juiciness is visually evident when an object of fresh produce is cut as is described in the specification page 7, paragraph 2, line 9 or arrives from the field with cuts and/or gashes from the mechanical harvesting process. The term is not intended to be numerically precise, but only one of several qualitative factors which may be used to as *"visual characteristics."* Use of relative terminology is not per se indefinite (See MPEP 2173.05(a) and (b); see also, *Seattle Box Co. v. Industrial Crating & Packing, Inc.* at 221 USPQ 568.)

More specifically, *"juiciness"* refers to the amount of liquid content contained or lacking in an object of fresh produce, and is a well known term in the relevant art for commodity standards and grades. Applicant's representative again respectfully refers the Examiner to the www.usda.gov for additional information regarding the term *"juiciness."*

For the convenience of the Examiner, a copy of a relevant webpage is provided in the Appendix to this correspondence.

Lastly, the phrase “*visual characteristics*,” is again clearly defined in the first paragraph on page 7, lines 3 – 5 as “*color, ripeness, size, damage or defects (or lack thereof), juiciness and aesthetic appeal.*”

g. Indefiniteness – “*visual characteristics II*”

The Examiner has rejected Claims 5, 10, and 19 as being “unclear.” Applicant’s Representative assumes the term “unclear” is intended as indefiniteness under 35 USC § 112 second paragraph for the phrase “*visual characteristics includes color, ripeness, size, damage, tenderness, juiciness, or aesthetic appeal.*” Applicant’s Representative respectfully traverses this rejection. The term “*juiciness*” was discussed above. The phrase “*aesthetic appeal*,” is another relative term intended to qualitatively define visual characteristics other than those specifically articulated which may be either more favorably or less favorably received in the fresh cut produce marketplace (See page 4, paragraph 5, line 27.) It is well known to one of ordinary skill in the art that visual characteristics play a key factor in the marketplace. For example, people expect apples to be shiny, tomatoes to be red or yellow having a smooth skin, oranges to be orange with a textured surface, etc. Additional examples include skin condition, shininess, seed count, irregular surface features, expected shape and like visually discernable characteristics. As an example, a tomato having shriveled skin similar to a prune would not have aesthetic appeal in the marketplace. These visual characteristics contribute to the “*aesthetic appeal*,” which “*may affect the freshness or salability of the fresh cut produce product.*” See page 7, paragraph 1, lines 5-6 of the specification.

Moreover, the cited reference to Bettencourt et al. in column 13 lines 21-33 describes a similar process where “*About eight farm laborers stand on each sorter platform 152, 153 and face the sorting conveyors 150 and 151. Unacceptable tomatoes and any extraneous matter on the conveyors 150 and 151 are removed by the laborers, leaving sorted tomatoes on the conveyors 150 and 151. Two or more of the laborers are positioned above and in front of the other sorters as they stand on the inset platform 151 and select good tomatoes from the loose tomato conveyors 108 and place them onto the*

main sorting conveyors 150 and 151. The relative terms of unacceptable and good provide clear evidence that one of ordinary skill in the art would understand what the phrase “*aesthetic appeal*” relates to.

h. Indefiniteness – “*visual characteristics III*”

The Examiner has further rejected Claims 5, 10, and 19 as being “unclear.” Again, Applicant’s Representative assumes the term “unclear” is intended as indefiniteness under 35 USC § 112 second paragraph for the phrase “*visual characteristics includes color, ripeness, size, damage, tenderness, juiciness, or aesthetic appeal,*” in relation to “*how and by whom aesthetic appearance is measured.*” Applicant’s Representative respectfully traverses this rejection. The “*visual characteristics,*” are ascertained by persons engaged in the process analogous to Examiner’s cited prior art to Cruess which photographically depicts and textually describes what generally constitutes visually observing undesirable sections relevant to both shelf stable and fresh produce processing on pages 436-437. As the reference to Cruess dates back to 1948, the determination of visual characteristics and by whom is clearly known in the prior art. The same arguments provided in the previous paragraph regarding Bettencourt et al. are relevant here as well.

i. Indefiniteness – “*reintroducing*”

The Examiner has rejected Claims 8 and 15 as being “unclear.” Applicant’s Representative again assumes the term “unclear” is intended as indefiniteness under 35 USC § 112 second paragraph for the phrase “*reintroducing at least said removed undesirable sections.*” More specifically, the phrase “is unclear as to “*at least*” of what is reintroduced into the system.” Applicant’s Representative respectfully traverses this rejection. It is apparent from the specification that what is reintroduced into the shelf stable process is “*substantially all of the usable rejected produce, produce juices and the cut tops and bottoms are returned to the shelf stable processing stream.*” (See page 6, paragraph 2, lines 17 – 19.) In specific response to the Examiners rejection the “*at least,*” refers to the usable portions of the clearly articulated fresh produce portions. Other cut portions, for example, tomato cores, as described in Cruess (page 437, second paragraph,) may be reintroduced as well, thus the Claims meaning are not indefinite, just another way

of stating including but not limited to. What may allowably be reintroduced into the shelf stable process is well known and governed by the USDA and equivalent state agencies.

Notwithstanding Applicant's transversal of Examiner's indefiniteness rejection of claims 1 - 19, applicant's representative has amended the following Claims to provide greater clarity as believed the Examiner has suggested and not for reasons of patentability.

Claims 1, 2, 8, 14, 15 have been amended to change "*shelf stable processing stream*" to "*shelf stable process*,"

Claims 1, 8, 14, 15, 18 have been amended to "*visually selected portion*."

Claim 2 has been amended to remove the phrase "*or at least a portion of any juices generated by said removing of one or more undesirable sections*," which the Examiner believed to be objectionable.

Claims 10 and 11 have been amended to a Markush group format to address the Examiners' clarity concerns.

Claims 2 and 15 have been amended to change "*diverting*" to "*cutting*."

Claim 18 has been amended to remove the phrase "*at least in part*" which the Examiner believed to be objectionable.

Claim 19 has been amended to change "*visually observable*" characteristics to "*visual*" characteristics.

j. Obviousness considerations Claims 1-6 and 8-11 Cruess in view of Bettencourt et al.

Cruess teaches shelf stable tomato processing in which fresh tomatoes are processed into a variety of products. Bettencourt et al. teaches a mechanical tomato harvester which may be used to provide the fresh tomatoes for the process described by Cruess. However, the combination of Cruess and Bettencourt et al. does not teach or otherwise suggest an additional fresh cut produce process.

Independent Claim 1 has been amended to include the limitation of diverting a plurality of fresh produce from the shelf stable process into a fresh cut produce process; said fresh cut produce process being separate from said shelf stable process but consolidated within a common processing facility. Antecedent basis for this amendment is provided in the specification page 2, paragraph 1, lines 5-6; page 4, paragraph 4, lines

23-24; page 5, paragraph 1, lines 1-3; page 6, paragraph 3, lines 9-10; page 7, paragraph 2, lines 7-8 and page 13, paragraph 1, lines 3-5.

Independent Claim 8 has been amended to include the limitations of consolidating a fresh cut produce process with said shelf stable process and diverting a portion of the fresh produce into said fresh cut produce process. The word “cut” was inserted in the last claim element of Claim 8 for proper antecedent basis with the previous claim element. The phrase “some of” was inserted between at least and said in the sixth claim element. The word “said” was inserted between into and shelf in the sixth claim element. The antecedent basis provided for Claim 1 is applicable to this Claim 8.

Independent Claim 14 has been amended to include the limitations of consolidating a fresh cut produce process with said shelf stable process and diverting a portion of the fresh tomatoes into said fresh cut produce process. The antecedent basis provided for Claim 1 is applicable to this Claim 14.

These amendments clearly distinguish independent claims 1, 8, 14 from the combination of Cruess and Bettencourt et al.

Claim 5 has been amended to correct an antecedent reference from cancelled Claim 4 to Claim 1.

Claim 9 has been amended to more specifically claim “*machine harvested*” tomatoes.

k. Obviousness considerations Claims 7 and 12-19 Cruess in view of Bettencourt et al. and Floyd et al.

Cruess teaches shelf stable tomato processing in which fresh tomatoes are aseptically processed into a variety of products. Bettencourt et al. teaches a mechanical tomato harvester which may be used to provide the fresh tomatoes for the process described by Cruess and Floyd et al. teaches modified atmospheric packaging (MAP.) However, the shelf stable (i.e., aseptic) product of Cruess has no need for MAP. Placing the tomato product generated by the Cruess process would nullify the aseptic process as MAP is does not provide an aseptic container. The tomato products outputted from the Cruess process are placed in cans or jars for long life.

Therefore, the combination of Cruess, Bettencourt et al. and Floyd et al., as suggested by the Examiner is invalid as one of ordinary skilled in the art would not consider this combination.

Alternately, Claims 7, 12, 13 depend from Claim 1 which is believed to novel and non-obvious. Therefore, Claims 7, 12, 13 must also be novel and non-obvious. Claims 15 – 19 (and new Claim 20) depend from independent Claim 14 which is believed to novel and non-obvious. Therefore, Claims 15 – 20 must also be novel and non-obvious as well.

I. Obviousness considerations Claim 14 Floyd et al. in view of Bettencourt et al.

Bettencourt et al. teaches a mechanical tomato harvester which may be used to provide the fresh tomatoes for the process described by Cruess and Floyd et al. teaches modified atmospheric packaging (MAP.) Independent Claim 14 has been amended to includes the limitations of "consolidating a fresh cut produce process with said shelf stable process," and "diverting a visually selected portion of said plurality of fresh tomatoes into said fresh cut produce process."; neither limitation is taught or suggested by the combination of Floyd et al. and Bettencourt et al.

Moreover, there must be some suggestion or motivation to combine the two references. Applicant's representative has found no suggestion or motivation in either reference to combine one with the either. To the contrary, the reference to Bettencourt et al. specifically states in column 13 lines 33 – 38, "*The tomatoes remaining on the main sorting conveyors 150 and 151 are passed to the transverse loading conveyor assembly 156 and are thence transported to an awaiting tomato bin on a flat bed truck (not shown) traveling adjacent to and synchronous with the harvester.*" The "tomato bin," is not a MAP.